

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

House Republican Campaign Committee,  
Complainant,  
vs.

Minnesota DFL State Committee,  
Respondent.

NOTICE OF DETERMINATION OF  
PRIMA FACIE VIOLATION  
AND  
NOTICE OF AND ORDER FOR  
PROBABLE CAUSE HEARING

**TO: David W. Asp, Lockridge Grindal Nauen, PLLP, Suite 2200, 100 Washington Avenue South, Minneapolis, MN 55401-2179; and Alan Weinblatt, Weinblatt & Gaylord, PLC, 111 East Kellogg Boulevard, Suite 300, St. Paul, MN 55101.**

On October 31, 2008, the House Republican Campaign Committee filed a Campaign Complaint with the Office of Administrative Hearings alleging that the Minnesota DFL State Committee violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material concerning Tim Kelly, a candidate for Minnesota House of Representatives District 28A. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a prima facie violations of Minn. Stat. § 211B.06.

**THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN** that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **1:30 p.m. on Thursday, November 6, 2008**. The hearing will be held by call-in telephone conference. You must call: **1-800-369-1701** at that time. When the system asks for your numeric pass code, enter **"20027"** on your phone and you will be connected to the conference. The probable cause hearing will be conducted pursuant to Minnesota Statutes § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at [www.oah.state.mn.us](http://www.oah.state.mn.us) and [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be emailed to Judge Johnson at [Bruce.Johnson@state.mn.us](mailto:Bruce.Johnson@state.mn.us) or faxed to 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in

the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minnesota Statutes § 211B.35. If the Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minnesota Statutes § 211B.34, subdivision 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: November 4, 2008

/s/ Bruce H. Johnson  
BRUCE H. JOHNSON  
Administrative Law Judge

### **MEMORANDUM**

The Complaint alleges that the Minnesota State DFL violated Minn. Stat. § 211B.06 by knowingly disseminating false campaign material concerning Tim Kelly. Tim Kelly is the Republican-endorsed candidate for Minnesota House District 28A. The Complaint asserts that on October 25, 2008, the Minnesota DFL State Fund disseminated a campaign flyer<sup>1</sup> that stated: "Kelly is under investigation for accepting an illegal campaign contribution from a corporation." The campaign flyer cites to "State of Minnesota OAH Docket No. 3-0320-19986 and Kelly Campaign Finance Board Filing."<sup>2</sup>

The Complaint alleges that this statement is false because Mr. Kelly is not "under investigation." Although a campaign complaint was filed against Mr. Kelly for allegedly accepting a prohibited corporate contribution and a prima facie violation was found, the complaint was subsequently dismissed by Order dated October 28, 2008. The Complainant maintains that under no reasonable construction can the filing of a campaign complaint with the Office of Administrative Hearings and a prima facie determination constitute an "investigation." The Complaint further alleges that the fact

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<sup>1</sup> Exhibit 1 attached to Complaint.

<sup>2</sup> OAH Docket No. 3-0320-19986-CV involved a campaign complaint claim that Mr. Kelly accepted a prohibited corporate contribution in the form of a free five-page "advertisement" that ran in a local magazine. The complaint was dismissed by Order dated October 28, 2008.

that the mailing was received by residents of District 28A on October 25, 2008, the day after the probable cause hearing in the earlier complaint, suggests that the Minnesota DFL State Committee knew the statement was false or communicated it with reckless disregard as to whether it was false. In other words, the Complainant suggests that the timing of the mailing, disseminating the flyer before the expedited probable cause determination could be made, is evidence that the Minnesota DFL either knew its “under investigation” claim was false or evidence that it communicated the claim “with a high degree of awareness” of its probable falsity.<sup>3</sup>

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

In *Kennedy v. Voss*,<sup>4</sup> the Minnesota Supreme Court observed that the statute is directed against the evil of making false statements of fact and not against unfavorable deductions, or inferences based on fact - even if the inferences are “extreme and illogical.”<sup>5</sup> The Court pointed out that the public is protected from such extreme and illogical inferences by the ability of other speakers to rebut these claims during the campaign process.<sup>6</sup> In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.<sup>7</sup>

The burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.<sup>8</sup> A statement is substantially accurate if its “gist” or “sting” is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there

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<sup>3</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), rev. denied (Minn. 2006).

<sup>4</sup> 304 N.W.2d 299 (Minn. 1981).

<sup>5</sup> *Id.* at 300.

<sup>6</sup> *Id.*

<sup>7</sup> *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).

<sup>8</sup> *Jadwin*, 390 N.W.2d at 441.

is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.<sup>9</sup>

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.<sup>10</sup> Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondents prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondents “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.<sup>11</sup>

For purposes of a prima facie determination, the Complainant must detail the factual basis to support a claim that the violation of law has occurred.<sup>12</sup> “Prima facie” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”<sup>13</sup> “Prima facie evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”<sup>14</sup> In determining whether a campaign complaint sets forth a prima facie violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

The Complaint in this matter turns on the meaning of the phrase “under investigation.” For purposes of this review, the Administrative Law Judge concludes that the Complainant has alleged sufficient facts to support finding a prima facie violation of Minn. Stat. § 211B.06 against the Respondent. Therefore, this allegation will proceed to a probable cause hearing as scheduled by this Order.

B.H.J.

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<sup>9</sup> *Id.*

<sup>10</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>11</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), rev. denied (Minn. 2006).

<sup>12</sup> Minn. Stat. § 211B.32, subd. 3.

<sup>13</sup> *Black’s Law Dictionary* 1228 (8<sup>th</sup> ed. 2004).

<sup>14</sup> *Id.* at 598.